

TAM 9723007, 1997 WL 302463 (IRS TAM)

Internal Revenue Service (I.R.S.)

Technical Advice Memorandum

Issue: June 6, 1997

February 13, 1997

Section 61 -- Gross Income v. Not Gross Income

61.00-00 Gross Income v. Not Gross Income

61.27-00 Interest in Estate or Trust

Section 671 -- Trust Income, Deductions, and Credits Attributable to Grantors and Others
As Substantial Owners

671.00-00 Trust Income, Deductions, and Credits Attributable to Grantors and Others As
Substantial Owners

Section 677 -- Income for Benefit of Grantor

677.00-00 Income for Benefit of Grantor

Taxpayer's Name:

Taxpayer's Address:

Taxpayer's Identification No.:

Years Involved:

Dates of Conferences:

LEGEND

A =

Tribe =

Trust Agreement =

Trust =

Date a =

Year b =

Year c =

Year d =

Year e =

xx =

*** =

Bank =

State =

State court cases =

ISSUES

1. Was A in receipt of gross income under [section 61 of the Internal Revenue Code](#) upon the funding of the Trust with per capita payments?
2. If so, was A the grantor of the Trust?
3. Was A the owner of the Trust under section 677 of the Code?
4. Did the distribution of the assets of the Trust to A upon termination of the Trust have tax consequences to A?

FACTS

Congress enacted the Indian Gaming Regulatory Act, [25 U.S.C. 2701 \(1988\) \(Act\)](#), on October 17, 1988. Section 3 of the Act provides that the purpose of the Act is to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments, and to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

Section 11(b)(3) of the Act provides that net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if: (A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by section 11(b)(2)(B); (B) the plan is approved by the Secretary of the Interior as adequate, particularly with respect to the uses described in clause (i) or (iii) of paragraph (2)(B); (C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and (D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made. Under section 11(d), class III gaming activities are lawful on Indian lands if they meet the requirements of section 11(b).

On Date a, the Tribe enacted ***. It provides that the *** intends *** to be a *** Any amendments to or rescission of *** provides that after certain deductions, up to xx percent of the remaining available net proceeds of the Tribe's *** may be paid to individuals *** and to the minor children *** when those minor children reach the age of eighteen as provided in *** provides that the schedule and plan for such distribution may be adjusted by the *** to establish certain funds and programs providing for the welfare of the Tribe.

*** provides that at the discretion of the *** future programs that provide benefit programs for housing, education, health, and medical care and insurance, child care, and other programs that benefit community members and their children may be established.

*** provides that *** deposits of per capita shares to *** trust funds at the Bank for *** (including A) shall continue.

*** A full per capita share shall be deposited each month into the trust accounts for these minors, until such time when the terms of the trust provide for the termination and distribution of the proceeds.

*** provides that the list of persons on the *** and the *** and their descendants, shall comprise the final and exclusive list of persons entitled to receive payments and other benefits from the present and future *** of the Tribe.

*** provides that except as otherwise provided in *** may only be amended or rescinded by *** In addition, *** provides that this restriction shall not *** apply to any amendments ***

In Year b, the Tribe established Trust. Per capita payments from Tribe's class II and III gaming activities were made to Trust during Years c, d, and e. In Year e, when A reached the age of eighteen years, the trust assets were distributed to her. *** of the Trust Agreement provides, in part, that the principal purpose of the trust is to accumulate the corpus and earnings of the trust until the beneficiary reaches the age of eighteen years. It is also a purpose of the trust to ensure that the beneficiary has trust assets available ***

*** of the Trust Agreement provides that the trustee shall hold the principal of the trust, and the income earned by the trust, and except as provided in *** shall not make a distribution to the beneficiary or any other person until the beneficiary reaches the age of

eighteen years.

*** of the Trust Agreement provides that if the beneficiary dies before attaining the age of eighteen years, the trust shall terminate and all trust assets shall be paid to the personal representative of the beneficiary.

*** of the Trust Agreement provides that when the beneficiary attains the age of eighteen years, the trust shall terminate and all trust assets shall be distributed to the beneficiary.

*** of the Trust Agreement provides that the law of State, except as altered by the Trust Agreement, shall govern the meaning and legal effect of the Trust Agreement and the administration of the trust.

*** of the Trust Agreement provides that the Trust Agreement can be amended or revoked *** was not rescinded. The Trust Agreement remained in effect until A reached the age of eighteen.

LAW

[Section 61](#) of the Code defines gross income as income from whatever source derived. Generally, a cash basis taxpayer does not recognize income upon the receipt of property in the form of a promise to pay in the future. However, a cash basis taxpayer is taxed when the taxpayer receives an "economic benefit" from a right to receive property in the future.

In [Sproull v. Commissioner, 16 T.C. 244 \(1951\)](#), aff'd per curiam, [194 F.2d 541 \(6th Cir.1952\)](#), the court held that the amount placed in trust to be paid out to petitioner in later years conferred an economic benefit on the petitioner in the year the trust was funded. In that case, the petitioner, a corporation president, voluntarily decreased his compensation. In a later year, when the corporation was sound financially, a trust was set up by the board of directors for the benefit of the petitioner. In determining that funding the trust conferred an economic benefit on the petitioner in the year the trust was established, the court noted that the funds were placed in trust irrevocably for the petitioner's sole benefit and that the petitioner had to do nothing further to establish his right to it.

The economic benefit doctrine has also been applied to require inclusion in income of prize winnings when they are irrevocably placed in a fund to be paid to the winner at a later date. See [Pulsifer v. Commissioner, 64 T.C. 245 \(1975\)](#); [Anastasio v. Commissioner, 67 T.C. 814 \(1977\)](#); [Rev.Rul. 62-74, 1962-1 C.B. 68](#); and [Rev.Rul. 67-203, 1967-1 C.B. 105](#).

[Rev.Rul. 83-25, 1983-1 C.B. 116](#), holds that a minor received the economic benefit of a trust when it was established by court order to receive damages awarded to the minor as a result of a personal injury suit. Under the terms of the trust, the trustee was authorized to distribute funds necessary for the health, education, support, or maintenance of the minor. The trust was not subject to revocation by the minor, but was subject to amendment, modification, or revocation by the court. The trust was to terminate upon the minor reaching the age of twenty-one, at which time the trust would distribute all of its property to him. [Rev.Rul. 83-25](#) further holds that the minor is the owner of the damages; the minor is treated as the grantor of the trust and under section 677(a) is treated as the owner of the trust because the income and corpus of the trust is to be distributed to the minor at the discretion of the court, a nonadverse party, or eventually distributed to the minor when the minor turns twenty-one.

Section 671 of the Code provides that where under subpart E the grantor or another person is treated as the owner of any portion of a trust, there shall then be included in computing the taxable income and credits of the grantor or the other person those items of income, deductions, and credits against tax of the trust that are attributable to that portion of the trust to the extent that such items would be taken into account in computing taxable income and credits against the tax of an individual.

Section 677 of the Code provides that the grantor shall be treated as the owner of any portion of a trust, whether or not he is treated as such owner under section 674, whose

income without the approval or consent of any adverse party is, or, in the discretion of the grantor or a nonadverse party, or both, may be distributed to the grantor or the grantor's spouse; or held or accumulated for future distribution to the grantor or the grantor's spouse.

ANALYSIS

*** of the Trust Agreement allows the Trust *** Agreement to be amended or revoked ***

This provision of the Trust Agreement shows that the Tribe has retained a right to revoke the Trust. Under State law, the Trust is a revocable trust. See State court cases; [Restatement \(Second\) of Trusts, sections 330 and 331 \(1959\)](#). However, as discussed below, even if the Tribe were to revoke the Trust, the Tribe would be required to hold the trust assets for A's benefit. Thus, under the facts and circumstances of this case, and in particular taking into account the provisions of *** A received the economic benefit of the per capita payments when the payments were placed in the [trust for her benefit. See Sproull and Rev.Rul. 83-25](#), and the cases and rulings cited therein.

Under section 11(b)(3)(C) of the Act, the Tribe may not provide for per capita payments unless "the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved." The Tribe made the per capita payments to the Trust for A's benefit. The Trust Agreement contains various provisions protecting A's interest in the per capita payments including provisions requiring that in the event of A's death prior to age eighteen *** the trust assets would be paid to A's personal representative, ***.

Under *** A, along with *** minors, was added to the *** states that *** In addition, *** provides that ***

This language is consistent with section 11(b)(3)(C) of the Act, which requires that the interests of minors who are entitled to receive per capita payments are protected and preserved.

Although *** of *** allow for the establishment of future welfare programs for the Tribe and its members, which may diminish future per capita payments to tribal members, per capita payments made prior to the implementation of a welfare program are not affected. In fact, the per capita payments made to A's trust were unaffected by these provisions.

*** of *** allows *** to be amended or rescinded except as otherwise provided in ***

Although the Tribe has the power to amend or rescind *** that power would not affect the *** has the effect of denying the Tribe any power to demand repayment of per capita payments made prior to an amendment or rescission of ***

Taxpayer argues that the revocable nature of the Trust and of *** prevent the amounts put in Trust from being income to A; however, in [Rev.Rul. 83-25](#), it was determined that a minor received the economic benefit of the damages placed in the trust and was the owner of the damages, even though the trust was a revocable trust. In light of the facts and circumstances described herein, and in particular taking into account the provisions of *** we conclude that A received the economic benefit of the per capita payments to the Trust when the per capita payments were made to the Trust. When the payments were made in Years c, d, and e, A should have included the amount of the payments in taxable income.

As the owner of the per capita payments deposited in the trust, A is considered the grantor of the trust. Because under the provisions of the Trust, the income and corpus of the Trust were to be distributed to A, at the discretion of a non-adverse party, or held or accumulated for future distribution to A, A is treated as the owner of the trust pursuant to section 677(a) of the Code for the taxable years at issue. Because A should have included in gross income the per capita payments to the trust when made and the income of the trust for each taxable year that A was treated as the owner of the trust including the year of termination of the trust, A should not have included in income any additional amounts upon termination of the Trust and distribution of the trust assets to A.

CONCLUSIONS

1. A was in receipt of an economic benefit upon the funding of the Trust with the per capita payments, and therefore, under [section 61](#) of the Code, should have included the deposits of the per capita payments in gross income when the deposits were made to the Trust in Years c, d, and e.
2. Therefore, for federal income tax purposes, A was treated as the grantor of the Trust.
3. Under section 677 of the Code, A was the owner of the Trust, and therefore should have included all items of income, deductions, and credits of the Trust in determining her taxable income for each year.
4. Because A was the owner of the Trust, the distribution of the assets of the Trust upon termination of the Trust had no tax consequences to A.

This document may not be used or cited as precedent. [Section 6110\(j\)\(3\) of the Internal Revenue Code](#).

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